

1 Hon. Ann A. Scott Timmer, Chair
2 Attorney Regulation Advisory
3 Committee
4 1501 W. Washington St.
Phoenix, AZ 85007

5 **IN THE SUPREME COURT**
6 **STATE OF ARIZONA**

7 In the Matter of:

Supreme Court No. R-17-0044

8 PETITION TO AMEND RULE 43,
9 RULES OF SUPREME COURT

Comment of Attorney Regulation
Advisory Committee

12 The Arizona Supreme Court Attorney Regulation Advisory Committee
13 (“ARC”) opposes the petition to amend Rule 43 that would remove a number of
14 requirements that serve to protect the public and ensure lawyer accountability.

16 Because the rule petition would remove requirements relating to the handling and
17 maintenance of trust accounts that serve to protect the public, ARC proposes that the
18 rule petition be denied.

20 The petition proposes to allow lawyers to obtain overdraft protection for trust
21 accounts; removes the requirement that lawyers conduct a monthly three-way
22 reconciliation of trust accounts; provides a five-day grace period for a lawyer to
23 remedy an overdraft wherein the Bar would be precluded from opening an
24 investigation based on the overdraft; permits a disciplinary investigation only if the
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1 lawyer does not provide a “satisfactory explanation” of the circumstances relating to
2 the overdraft; and, limits regulatory authority by removing language that permits
3 inquiry when information regarding trust account management comes to the
4 attention of the State Bar.
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6 The funds contained in a lawyer’s trust account belong to the client or third
7 party who has an interest in the funds. Lawyers have a fiduciary obligation to
8 maintain and protect the funds that have been entrusted to them. The current rules
9 provide for the protection of the client by creating accountability for the handling
10 and preservation of funds in the trust account. The petition proposes to shift the
11 consumer protection aspects of the trust account rules to shield the lawyer from
12 inquiry as well as obscure the theft of client funds.
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15 The petition proposes to allow lawyers to obtain overdraft protection on their
16 trust account. Overdraft protection would alleviate lawyer accountability for trust
17 account funds. Record keeping and the accountability associated with it becomes
18 less important when the lawyer knows that disbursements of uncollected funds will
19 be covered by the overdraft protection. Rule 43 requires lawyers to bank at financial
20 institutions that agree to report overdraft notices to the State Bar. Overdraft
21 protection on the lawyer’s trust account would nullify the early detection of the
22 mismanagement or misappropriation of client funds.
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25 The rule petition also proposes to eliminate the three-way reconciliation of the

1 trust account bank statements, client ledgers and general ledger/checkbook register
2 required by Rule 43. The three-way reconciliation is part of the process that ensures
3 the proper handling, maintenance and disposition of funds belonging to the client or
4 third person. The purpose of the three-way reconciliation is to identify any errors in
5 record keeping that could result in the misappropriation of funds or the use of one
6 client's funds for another. The lawyer may conduct the three-way reconciliation on
7 their own or retain a bookkeeper or other appropriately trained and supervised person
8 to perform the review. Given the heightened responsibility of the lawyer as a
9 fiduciary of the funds entrusted to them, the three-way reconciliation is not an overly
10 burdensome process such that there is any justification to remove the requirement
11 from the rules.

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15 The petition also proposes that in the event of an overdraft the lawyer shall
16 have five days to rectify the overdraft and if it is not remedied the financial institution
17 shall then notify the State Bar. If the lawyer does not provide a "satisfactory
18 explanation" the State Bar may then "institute a disciplinary charge against the
19 lawyer." There is no reasonable justification to eliminate the notification provision
20 of this Rule. If a lawyer is maintaining the trust account in accord with applicable
21 rules, an overdraft will not occur. If an overdraft occurs, it suggests that there may
22 be deficiencies in the lawyer's adherence to the rules. Again, given the lawyer's
23 fiduciary obligations relating to trust account funds, having to account for the cause
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1 of an overdraft is concomitant to the responsibility of being entrusted with funds
2 belonging to the client or a third person. If an overdraft occurs as a result of a simple
3 error, the lawyer is instructed by way of an educational comment advising of rule
4 requirements and directing them to various resources to assist them in the proper
5 maintenance of the trust account. The inconvenience to the lawyer in having to
6 respond to an inquiry regarding an overdraft does not justify removing the protection
7 notification serves.
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10 Petitioner also proposes that for “all checks in excess of \$5,000 that are
11 deposited in the lawyer’s trust account, the lawyer shall wait at least ten (10) business
12 days before distributing any funds represented by such check to be sure that such
13 check clears the drawer’s account.” The rules currently restrict the disbursement of
14 uncollected funds unless they are a limited risk deposit. The purpose for that
15 restriction is to make certain that funds are available before disbursement so other
16 client funds are not at risk of being converted in the event the funds are not collected.
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18 Petitioner’s proposal suggests that any check less than \$5,000 could be immediately
19 disbursed. This would put lawyers at greater risk for converting client funds by not
20 waiting a sufficient period to ensure that the funds are collected.
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23 Petitioner also suggests elimination of the authority to conduct random trust
24 account examinations of lawyer’s trust accounts. Rule 43(d)(1) provides for a
25 random trust account audit but random audits have not occurred. The purpose of the

1 random audit is twofold. One, the random audit serves as a deterrent to the misuse
2 of funds entrusted to the lawyer and two, it affords an opportunity to provide lawyers
3 with practical assistance with and an understanding of the proper maintenance and
4 handling of trust account funds and records. Because of the remedial nature of the
5 random audit, it is considered to be a proactive approach to regulation and therefore
6 a program incorporated into proactive management based regulation ("PMBR").
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8 **CONCLUSION**

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10 For the reasons cited above, the Supreme Court Attorney Regulation Advisory
11 Committee respectfully requests that the Court deny the petition to modify Rule 43.
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13 RESPECTFULLY SUBMITTED this 21st day of May, 2018.

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16 Hon. Ann A. Scott Timmer, Chair
17 Attorney Regulation Advisory Committee
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